No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

REPLY BRIEF 1

I. The government's attempt to minimize the case's importance is unsuccessful 2

II. The government's defense of the Ninth Circuit's remand decision misses the mark 6

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Sturgeon v. Frost,
136 S. Ct. 1061 (2016) ..... *passim*

Alaska v. United States,
545 U.S. 75 (2005) 10

Tarrant Regional Water Dist. v. Herrmann,
569 U.S. 614 (2013) 10

STATUTES AND OTHER AUTHORITIES

16 U.S.C. § 3101 11

16 U.S.C. § 3102 3

16 U.S.C. § 3103 7

54 U.S.C. § 100101 3

54 U.S.C. § 100751 ..... 3, 5, 8, 9

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, § 339(d), 112 Stat 2681 9

REPLY BRIEF

The brief in opposition ("BIO") is familiar. The last time Petitioner sought review, the government opposed based mostly on alternative arguments and its insistence that Mr. Sturgeon's claim of importance "rest[ed] on misunderstandings of NPS's regulations and of the decision below." Br. in Opp. at 13, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (No. 14-1209). The Court disagreed with those arguments and granted review. The Court unanimously reversed, noting that "while defending the reasoning of the Ninth Circuit," the government relied "primarily on very different arguments." *Sturgeon*, 136 S. Ct. at 1069. The Court then remanded the case for the Ninth Circuit to consider the government's alternative arguments. On remand, the Ninth Circuit seized on one of those arguments to reach the same result, holding that the Nation River is "public land" under ANILCA.

In opposing review now, the government takes the same approach. It again characterizes the remand decision as limited in effect, BIO 20, again defends the judgment below with an alternative argument the Ninth Circuit did not adopt (*i.e.*, the concurrence's rationale), *id.* at 12-15, and again suggests that Petitioner's claim of importance rests on a "mistaken" understanding of the remand decision's reach, *id.* at 21.

The government's opposition is as unconvincing as it was last time. A Ninth Circuit decision declaring significant portions of Alaska to be "public land" under a federal statute designed to insulate the State from federal encroachment is unquestionably important. Neither the remand decision's rationale nor the alternative argument

that the government favors is legally defensible. And the ruling's scope is (once again) anything but narrow, effecting a sweeping transfer of control over Alaska's waters from the State of Alaska to the National Park Service ("NPS"). The Court should grant the petition.

I. The government's attempt to minimize the case's importance is unsuccessful.

This case dramatically expands the authority that NPS may exercise over non-federal land and waterways, raising "vital issues of state sovereignty," *Sturgeon*, 136 S. Ct. at 1072, that are important to Alaska and the other States throughout the West, Pet. 21-27; Brief Amicus Curiae of Alaska ("Alaska Br.") 1-2, 6-8. The government's attempts to minimize the wide-ranging ramifications—and thus the significance—of the remand decision fall short.

Foremost, the government's position is premised on a serious misunderstanding of the Ninth Circuit's decision. According to the government, "the decision on remand affirms only the National Park Service's authority to regulate *navigable waters* within units of the National Park System for particular purposes based on the reserved-water-rights doctrine, using the authorities in Section 100751(b)." BIO 20. On that basis, the government argues that (unlike last time) this decision implicates only NPS's authority over navigable waters within CSUs—as opposed to the non-federal land submerged beneath them or the uplands and wetlands surrounding them. *Id.* at 19-21. The government is incorrect.

That position *might* have been defensible had the concurrence's rationale prevailed. Pet. 32 n.3. But it did not. The majority held that *any* waterways in which the United States holds a reserved water right are "public land" under ANILCA. 16 U.S.C. § 3102(3). The Ninth Circuit thus did not limit its holding to navigable waterways, nor to NPS's delegated authority under the 1976 Improvement Act to "prescribe regulations ... concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. § 100751(b). As "public lands," *i.e.*, "federal lands," this territory is now subject to a complete NPS takeover under the Organic Act, which empowers NPS to issue *any* regulation of *federal* parkland it "considers necessary or proper," 54 U.S.C.§ 100751(a), to "conserve [their] scenery, natural and historic objects, and wild life," 54 U.S.C. § 100101(a).

As a result, the power the Ninth Circuit granted NPS over non-federal lands and waters physically located inside Alaska CSUs is far broader than the government cares to admit. Unless this Court grants review and rejects the Ninth Circuit's holding, any state or private waterway in Alaska within a CSU where there is a reserved water right is subject to the full array of NPS authority. In short, the ruling grants NPS near-universal authority over Alaska land, water, and natural resources that the United States concedes it has not acquired.

Like last time, then, the government seeks to defend the judgment on narrower grounds that the Ninth Circuit did *not* adopt so that it may secure far broader authority if it can avoid certiorari. The Court should again reject this gambit. The "considerations" that led the Court to grant

certiorari last time have not dissipated. BIO 20. The same sovereignty and economic concerns warranting review then make review appropriate now. Pet. 21-27; Alaska Br. 4-15. Indeed, the government's belated acknowledgement that the initial Ninth Circuit ruling "could be understood to have much broader ramifications," BIO 19, should be taken as a concession that the ramifications of the remand decision are equally broad.

But reviewing the Ninth Circuit's remand decision is actually *more* important this time. Pet. 24-27. The ruling's interpretation of "public lands" raises concerns far beyond Alaska's borders, given the statutory term's prevalence in the enabling legislation of national parks across the West. *Id.* at 26-27 & n.1; Alaska Br. 25-26. The government offers no response to this concern because there can be none. If this is what "public land" means under ANILCA, it follows that the term will carry that same meaning under other federal laws too.[1]

In any event, the Court's review would be warranted even if the government were correct in claiming that the remand decision is limited only to navigable waterways themselves under the Improvement Act. Alaskans uniquely rely on access to their waters for their survival. Pet. 22-24. "Alaska's massive size, widely dispersed population, lack of developed infrastructure, variable topography, and extreme climate ... make it the nation's most remote state." Alaska Br. 5. Therefore, "Alaska's waters provide

1. The government's notation that this case does not implicate a circuit split, BIO 19, is no response. ANILCA, of course, is an Alaska-specific statute. And the overwhelming majority of territory that could be implicated by the remand decision is located in the Ninth Circuit. Pet. 26-27 n.1.

essential travel corridors year round" so that those living in remote regions of the State can "access health care, goods, and services; recreate; and travel to hunting and fishing grounds." *Id.* at 6.

Access to these waterways also is essential to Alaska's economic well-being. "Localized resource-based activities—such as local tourism and recreation-related jobs or small scale mining, sport fishing, wildlife guiding, or trapping—often provide an essential part of families' incomes and contribute to the economic activity of the region." Alaska Br. 6-7. "What is at stake here for Alaska, therefore, is not just a disagreement with the National Park Service about permissible weekend recreation or the best method of routing tourists through national parks." *Id.* at 7-8. The ruling impairs Alaska's ability "to maintain unencumbered access and meaningful use of Alaska's natural resources by its citizens." *Id.* at 8.

The government responds that (under its mistaken reading of the Ninth Circuit's decision) Alaskan waterways are just subject to the same NPS regulations that apply "everywhere else in the country." BIO 21. This is incorrect. The Ninth Circuit held that Alaska's navigable waters subject to a reserved water right are "public lands," not simply that these waters are subject to NPS authority under Section 100751(b). For the second time, the Ninth Circuit has interpreted Section 103(c) to subject lands and waters in Alaska to *more* federal regulations than "everywhere else in the country."

But even if the government were correct, review here is no less urgent. Because "Alaska is different," *Sturgeon*, 136 S. Ct. at 1070, this Court has expressed caution before

assuming that regulations should be applied to the State in the same way they apply elsewhere. The Ninth Circuit and NPS may well reject "the simple truth that Alaska is often the exception, not the rule," *id.* at 1071, and take the view that Alaska is not entitled to special dispensation. But the overarching dispute here is whether Congress, in passing ANILCA, took a different view. And this Court has always ensured that overzealous agencies and lower courts do not override the congressional determination that Alaska must be allowed to manage its natural environment for the benefit of its people. Pet. 23.

Finally, the government tries to downplay the fact that even under its own minimalist interpretation of the remand decision, NPS's authority extends not only to these waters, but all those waters that are appurtenant to them. BIO 21. The government emphasizes that before it may gain control over those additional waters, NPS must demonstrate that the regulation is "'needed to accomplish the purposes of the reservation.'" *Id.* (quoting App. 12a). But that requirement is ministerial under the Ninth Circuit's reasoning. Pet. 24-25. If a generic federal interest in "maintaining the environmental integrity," BIO 21, is all NPS needs to take control over every stream, lake, and wetland in Alaska that has some attenuated hydrological connection to navigable waterways to which the United States has reserved water rights, it is no limitation at all.

II. The government's defense of the Ninth Circuit's remand decision misses the mark.

The Ninth Circuit's conclusion that John Sturgeon was using his hovercraft on "public land" is unsustainable. Pet. 27-34. That is likely why the government mostly defends

the ruling on a different ground, namely that the hovercraft regulation should be upheld based on NPS's authority to control navigable waters (*i.e.*, the concurrence's proposed rationale). BIO 12-15. Both rationales are wrong.

The government's defense of the remand decision's actual reasoning adds little. The government cites a few cases to support its claim that "reserved water rights are property interests." BIO 15. But the brief conspicuously stops short of asserting that those reserved water rights create a "title" interest, as ANILCA requires to support categorization as "public lands." Pet. 8. That is because the government's position is that neither the United States nor Alaska holds "title to ... the navigable waters themselves." BIO 14. And whether the United States holds "title"—not whether reserved water rights are some form of a property interest—is what matters under ANILCA. Pet. 33 n.4.[2] The one thing upon which the parties seem to agree, then, is that the Ninth Circuit erred in concluding that the United States holds a title interest in these waterways.

Instead of acknowledging these flaws, the government carefully avoids exposing its disagreement with the Ninth Circuit's reasoning. In defending it, the government first points to NPS regulations as corroborating the rationale below. BIO 16. But the government, notably, does not ask for deference to NPS's interpretation of ANILCA. For good reason. The clear statement rule applies here, Pet.

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2. Moreover, it is far from clear that reserved water rights are a property interest at all. Pet. 27-28. But even if they are, reserved water rights only confer the right to use (or limit the use of) water; reserved water rights do not confer regulatory jurisdiction over the entire body of water. *Id.* at 31-33.

28-30; Alaska Br. 22-24, and, regardless, the text of the statute unambiguously forecloses NPS's unreasonable reading of ANILCA. Pet. 33-34.

The government then turns to the Ninth Circuit's *Katie John* decisions to substantiate the "public land" rationale. Supporting the Ninth Circuit, the government takes the view that the hovercraft regulation must be upheld if the subsistence regulations are valid. BIO 16-17. In so arguing, however, the government declines to grapple with the textual basis for distinguishing between the two species of regulation, Pet. 30 (discussing Title VIII of ANILCA), and how those important differences impact the scope of NPS's "navigable servitude" authority, Pet. 32 n.3. The *Katie John* decisions provide no basis for interpreting ANILCA to transfer title over non-federal land and water to the United States for NPS to manage as if it were federal parkland that has been acquired.

This half-hearted defense of the Ninth Circuit's rationale has a simple explanation: the government believes in a different argument. Like the concurrence below, the government believes it has the power to ban hovercrafts *irrespective* of ANILCA. BIO 12-15, 17-19. According to the government, Congress granted NPS authority to "prescribe regulations ... concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States," 54 U.S.C. § 100751(b), and ANILCA did not eliminate that authority, *id.* at 14-15. That is incorrect. In creating these Alaska parks and preserves, ANILCA expressly *withheld* this authority from NPS.

One of ANILCA's major concerns was to ensure that NPS could not exercise regulatory authority over the non-federal land and water that became surrounded by CSUs when the law was enacted. Pet. 8-10. Hence, although NPS generally may regulate "boating and other activities on or relating to water located within System units," under the Improvements Act, ANILCA specifically states that "[o]nly those lands within the boundaries of any conservation system unit which are public lands ... shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). If NPS wants ownership and control of these lands and water, the Secretary "may acquire" them, and if he does, "any such lands shall become part of the unit, and be administered accordingly." *Id.* But under ANILCA, NPS may not regulate "'non-public' land in Alaska as if that land were owned by the Federal Government." *Sturgeon*, 136 S. Ct. at 1068. Thus, the government's assertion that ANILCA does not specifically override NPS's general "authority under Section 100751(b) to regulate the use of hovercraft or other activities on the Nation River," BIO 14, is incorrect. That is precisely what Section 103(c) of ANILCA does. Pet. 33.[3]

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3. The government incorrectly argues that Congress has ratified its interpretation of ANILCA. BIO 16. Congress issued a moratorium on federal management of subsistence to allow Alaska time to consider enacting its own subsistence regime. But Congress did not weigh in on this dispute. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, § 339(d), 112 Stat 2681 (1998) ("Nothing in this section invalidates, validates, or in any other way affects any claim of the State of Alaska to title to any tidal or submerged land in Alaska."). An appropriation bill is a thin reed to support the argument that Congress placed its imprimatur on the Ninth Circuit's application of the reserved water rights doctrine in the *Katie John* decisions.

As a result, the government's reliance on its authority under the Commerce Clause to regulate navigable waters, BIO 12, misses the point. No one doubts the authority of the United States to ensure the flow of commerce over navigable waters or that the United States may hold "reserved water rights" in narrowly-confined circumstances. Pet. 22-24. But reserved water rights do not create a title interest, and Congress must delegate its commerce power before an agency may deploy it. *Id.* at 22. ANILCA (except as provided in Title VIII) prevents NPS from invoking the United States' federal commerce power to systematically regulate Alaska's lands and waters. Pet. 30. And any reserved water rights that NPS may hold must be invoked based on an identified need to ensure a specific federal reservation is not entirely defeated—not to circumvent ANILCA and assert plenary control over every Alaska waterway within or appurtenant to CSUs. Pet. 25-26, 31-33.[4]

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4. At times, the government suggests that all that matters, for purposes of establishing regulatory control, is that navigable waters are "subject to the jurisdiction of the United States." BIO 2. Even if true, as explained above, that power resides with Congress, and ANILCA cabins NPS's authority. But it is also untrue that navigability triggers plenary federal authority. The United States may possess "significant authority ... by virtue of its dominant navigational servitude," *Alaska v. United States*, 545 U.S. 75, 117 (2005) (Scalia, J., concurring in part and dissenting in part), but States have an important interest in navigable waters too by virtue of their ownership of the lands submerged beneath them. Alaska Br. 22-23; *see Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) ("We have long understood that as sovereign entities in our federal system, the States possess an 'absolute right to all their navigable waters and the soils under them for their own common use.'" (citation omitted)).

Finally, the government turns to ANILCA's purpose and structure. BIO 17-19. But that effort is in vain. To be sure, one of ANILCA's purposes is "'to protect and preserve ... rivers'" and other "waters" in Alaska. BIO 18 (quoting 16 U.S.C. §§ 3101 (a)-(b)). ANILCA thus expanded the National Park System by over 43 million acres. Pet. 6. But Congress also recognized the importance of ensuring "'adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.'" *Sturgeon*, 136 S. Ct. at 1066 (quoting 16 U.S.C. § 3101(d)). That is why, as the legislative history confirms, ANILCA insulated non-federal land physically located in the CSUs from NPS's oversight and control. Pet. 8-10.

The government's structural arguments are no better. In fact, the brief's reliance on "provisions constraining the Secretary's authority to regulate activity such as motorboating ... and commercial fishing rights," BIO 18, undermines the government's argument. Those provisions afford additional protections for Alaskans on *federal* land that are unavailable in other national parks because of the State's uniqueness. *Sturgeon*, 136 S. Ct. at 1070-71. The Court has already rejected one "topsy-turvy approach" to Section 103(c). *Id.* at 1071. The notion that Congress went out of its way to give NPS less authority over federal land in Alaska than elsewhere in the country, yet gave NPS unparalleled authority over non-federal land in Alaska is equally illogical.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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